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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TECHNICAL SERGEANT TERRY H. COX,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that plain error had not occurred at petitioner's court-martial when the chief of military justice at the base petitioner was court-martialed, who had been the former prosecutor on the case and conducted an investigation, testified on behalf of the government that he had determined that there was a legitimate basis for the charges against petitioner.

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Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Technical Sergeant Terry H. Cox, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 27 September 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an

advance sheet or the Military Justice Reporter. The decision, No. 95–0873, _M.J._ (27 September 1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals as reported at 42 M.J. 647 (AF Ct. Crim App 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 27 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

> The Fifth Amendment of the Constitution of the United States provides in relevant part: No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner and his wife, Karla, had been married nearly 10 years at the time of trial. They had two children: Kalyn Marie, born on 16 November 1985, and Courtney Raye Cox, born 16 December 1988. (R. 413). The Cox's were a happy and loving couple, who made it a priority to spend quality time with their children. When allegations of child molestation surfaced, Mrs. Cox was completely stunned. (R. 163). Mrs. Cox testified that her daughters' claims "blew [her] away" (R.192). According to Mrs. Cox, petitioner was a good father, whose children respected and loved him a great deal. She had never seen any improper interaction between

her children and her husband and the children never exhibited any inappropriate behavior which would give rise to suspicions of sexual abuse.

The allegations of abuse arose on 25 July 1992, when Kalyn Cox was caught playing "sexy" or "gross" with her friend, Auna Palangi, at Auna's house. (R. 98). Auna's mother walked into her daughter's bedroom to find the children engaged in hugging on the bed. (R.89–90). When Mrs. Palangi separately questioned the girls, they each explained that they were "playing house" and "french kissing." (R. 87–94). Auna told her mother that she learned those things from Kalyn. (R.91). When Mrs. Palangi questioned Kalyn, Kalyn pleaded with Mrs. Palangi not tell her mother, for fear Kalyn would get in trouble. (R. 93). Mrs. Palangi asked Kalyn where she learned the things that she and Auna had been doing. Kalyn replied that she had learned them "from the movies her mom had thrown away...the one's [sic] with the naked people in them." (R. 92). After this disclosure, Mrs. Palangi waited for Kalyn's mother to arrive so that she could handle the matter. (R. 93). Shortly thereafter, Mrs. Cox called, and Mrs. Palangi asked her to come over right away. (R. 93). When Mrs. Cox arrived, she questioned Kalyn further. According to Mrs. Cox, Kalyn then made allegations of having been sexually abused at the hands of her father. (R. 156).

When Mrs. Cox became aware of the allegations of child sexual abuse, she did not report the alleged abuse disclosed by her daughter until five days later. (R. 163). Sometime during those five days, Mrs. Cox was told by a friend that if she did not make a report, Social Services could take Kalyn and Courtney away from her. (R. 183). In fact, one social worker informed Mrs. Cox that "if it appeared that she (Mrs. Cox) was cooperating with her husband, she could end up losing her children" for that reason as well. (R. 183).

The petitioner was found guilty as outlined above and his

conviction was affirmed by the Air Force Court of Criminal Appeals (AFCCA). *United States v. Cox*, 42 M.J. 647 (AF Ct. Crim App 1995). On 27 September 1996 the Court of Appeals for the Armed Forces likewise confirmed petitioner's conviction.

REASON FOR GRANTING THE WRIT

PLAIN ERROR OCCURRED WHEN THE INSTALLATION'S CHIEF OF MILITARY JUSTICE AND FORMER PROSECUTOR ON APPELLANT'S CASE TESTIFIED FOR THE GOVERNMENT THAT HE ASCERTAINED THAT THE CHARGES AGAINST APPELLANT HAD A LEGITIMATE BASIS IN FACT.

This issue is most troublesome, because it involves conduct by a member of the bar and an attorney who had been assigned as the prosecutor in a criminal case, and who testifies at the subsequent criminal trial as a person experienced in the detection of determining the truth of allegations, all to the extreme prejudice of petitioner. Specifically, a chief of military justice[1] ignored one of the basic rules of practice, became a witness in a case, and continued in the case in a manner which, essentially, presented a conflict of interest. As a potential witness, he was nonetheless preparing other witnesses for trial. He then proceeded to repeatedly state, in front of the panel who were aware of his position and role in the case, that he had determined that the charges were "legitimate", i.e., that petitioner was guilty.

Major Treanor, the Chief of Military Justice, was initially

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[1]The Chief of Military Justice at an Air Force Base runs the criminal justice system on a base.

the assistant trial counsel on petitioner's case (prosecutor), but was removed from the case shortly after the Article 32 Investigation so that a less experienced attorney, Captain Wink, could act as assistant trial counsel to gain experience. (R. 468). By the time he was removed, Major Treanor had already interviewed (as the prosecutor) Courtney Cox. By this action, he become a potential witness in the case (R. 462). In January 1993, Major Treanor was re-assigned to the case because Captain Wink had other obligations. (R. 468). Major Treanor had been informed in December 1992 by defense counsel that he might be a witness in the case (R. 471), but the record reveals no demur on his being re-assigned to the case as assistant trial counsel. He then continued to prepare the case, and withdrew from the case only a few days before trial. (R. 458). Free of the burden of being a prosecutor in the case, Major Treanor was called as a government witness and, after identifying himself as Chief of Criminal Law and as a part-time Deputy Staff Judge Advocate, testified in response to a question by defense counsel regarding his qualifications to interview child witnesses:

> Certainly I, as an attorney, as the Chief of Military Justice, have an ethical obligation to ascertain if there is a legitimate basis or not in fact to go forward with charges in a prosecutorial mode against someone. (R. 454).

With regard to Courtney Cox, he said:

> I had to find out in my own mind if there was a legitimate basis for going forward with a charge involving this youngest Cox daughter against her father, I needed to find out if it was there or not. (R. 454).

On re–direct examination, Major Treanor said:

> We as prosecutors, we as attorneys, have an ethical

> obligation not to bring fraudulent charges, bad faith prosecutions, so on and so forth. In other words we have to be certain in our own mind that there is a legitimate factual basis to go forward with allegations against an accused. To do otherwise is not only a breach of faith as professionals, but is something which will undermine the entire judicial system, and that's why we have an obligation to get to the bottom of what the facts are. (R. 474).

Argument

If Major Treanor been the trial counsel, the Rules of Professional Responsibility would not have allowed him to say such things to the jury. *See,* Standards for the Administration of Criminal Justice, The Prosecution Function, section 5.8 (b), American Bar Association; and *United States v. Knickerbocker*, 2 M.J. 128 (CMA 1977). The conduct of an Air Force Judge Advocate during the course of a trial is subject to strict guidelines by the Air Force Rules of Professional Responsibility, rules of evidence, and case law. The Rules of Professional Responsibility prohibit an attorney in a case from making extrajudicial public comments regarding the guilt or innocence of a defendant [Rule 3.6(b)(4)]. An attorney may not act as an advocate in a case where he is likely to be a witness [Rule 3.7]. An attorney may not "assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, . . . or the guilt or innocence of an accused. . . ." [Rule 3.4(e)]. The alarming tendency of attorneys to either inadvertently become witnesses or to cross–examine witnesses based on personal knowledge was the subject of discussion at the Judicial Conference of the United States Court of Appeals for the Armed Forces, held in May 1995. Professor Imwinklereid discussed this

phenomenon, noting that disciplinary authorities should enforce this prohibition with "special vigor." Professor Edward J. Imwinklereid, **Ethics**, The Judicial Conference, United States Court of Appeals for the Armed Forces, 1995, Sec. 12.8.

In the instant case, we have a situation where a trial counsel, who was the Chief of Military Justice and at one time appointed to be a prosecutor in petitioner's case, seems to have manipulated the system in order to prepare the case, then become a witness. An example of this may be clearly found in the record of trial, at p. 461. On cross–examination, defense counsel asked Major Treanor whether he was trying to "get all the charges" he could at that point; Major Treanor responded that he was trying to ascertain that he had "good faith" charges. Defense then questioned Major Treanor about the role of prosecutors in an investigation, i.e. whether it was true that they should interview witnesses but not become investigators themselves. Major Treanor then, again, discussed the need to ascertain that charges were "legitimate." Finally, the defense counsel noted that Major Treanor was not answering the questions asked. The Chief of Military Justice took **every** opportunity to state, on the stand, that he had personally determined that the charges were "legitimate", i.e. that petitioner was guilty. These statements, many made in the guise of answers on cross–examination, were not even responsive to the questions asked. The scenario replayed itself at least one other time during the cross–examination (R. 463). In essence, Major Treanor had the best of both worlds: he investigated the case and prepared it for prosecution, then acted as a witness in the same case.

Although Major Treanor indicated that the decision to withdraw was made at the last minute, literally a few days before trial (R. 458), his own testimony was in conflict with that assertion. First, Major Treanor was aware that he was a

potential witness in the case. He had been informed by Captain Murrey, one of the defense counsel, of this possibility on the day of the Article 32 Investigation into the case. Further, he conducted a witness interview with only the alleged victim's mother present. Any competent attorney would have been aware that he could become a witness. Despite this impediment to his impartiality and clearly defined role as an advocate, he continued to prepare the case as a prosecutor, to include preparing the witnesses for trial. Only a few days before trial, Major Treanor finally recognized his ethical obligation and withdrew from the case. Suddenly available to be a witness, he proceeded to tell the panel, in hardly veiled references, that petitioner was guilty.

This conduct undercuts the clear intent of the ethical requirements placed on advocates. For obvious reasons, there is no case law directly on point with this scenario. However, as a policy matter, case law discourages this type of conduct. In *United States v. Clifton,* 15 M.J. 25, 30, n.5 (CMA 1983), the Court of Military Appeals (now the Court of Appeals for the Armed Forces), in *obiter dicta*, expressed disapproval where a prosecutor asserted that the defendant in that case was a liar, noting that it was unprofessional for a prosecutor to express an opinion as to the truthfulness or falsity of testimony or evidence. *See also, United States v. Fortner,* 34 M.J. 836, 840, n.2 (AFCMR 1992). In *United States v. Hebert,* 32 M.J. 707 (ACMR 1991), *aff'd* 35 M.J. 266 (CMA 1992) a prosecutor made loud references at a break about the "guilty son of a bitch" who was "going to jail." The statements were not made in the hearing of the panel, but the Court was sufficiently concerned about this impropriety to note this misconduct in its opinion. The remedy for prosecutorial misconduct which would result in a miscarriage of justice is mistrial. *United States v. Garces,* 32 M.J. 345 (CMA 1991). As a policy matter, it is clear that the ethical

standards of the legal profession strongly discourage prosecutors, and attorneys in general, from becoming witnesses in their own cases, and from commenting on the truthfulness of evidence or testimony. By stating that the charges had a factual basis, this is exactly what Major Treanor was doing. If the charges were based in fact, then clearly the statements, on the stand and to Major Treanor in interviews, by the alleged child victims were truthful and should therefore be believed.

The lower courts correctly noted that this is a question of plain error, as defense failed to object on the grounds of prosecutorial misconduct, conflict of interest, or the fact that a witness was providing a personal opinion as to the truth of the allegations. In order for plain error to be found, there first must be an error. Second, the error must be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious." Third, the error must "affec[t] substantial rights." *United States v. Olano,* 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). In addition to being "obvious and substantial, it must also have 'have had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher,* 21 M.J. 327, 328–29, (CMA 1986).

That there was error should be undeniable, as the former prosecutor, only recently withdrawn, made inflammatory remarks regarding the guilt of petitioner to the panel about the legitimacy of the charges. While not technically within the confines of the ethical and case law prohibitions because he was not actually the prosecutor, the court members on the jury panel were aware that he was the prosecutor until only recently, so petitioner contends the impact is the same. Major Treanor placed his personal stamp of approval, directly before the members, on the legitimacy of the charges against petitioner. Obviously, the charges were before the courtmembers because someone in authority believed them to

be true. However, a witness, and certainly a former prosecutor on the case, cannot provide a personal opinion to a jury about the truthfulness of a witnesses testimony or the truthfulness of the charges. To allow a prosecutor to evade the ethical rules and the clear guidelines set by case law would be setting a precedent that would be unhealthy in the extreme. Error occurred.

It is incontrovertible that petitioner suffered extreme prejudice because of the statements of the Chief of Military Justice. The lower courts' determination that there was no prejudice because the remarks were limited to referral or preferral of charges, as opposed to the ultimate question of guilt, is curious in light of the absence of any such distinction in the record. In fact, Major Treanor specifically referred to his ethical obligation "not to bring fraudulent charges, *bad faith prosecutions*. . ." (emphasis added) and to ascertain that there was a "legitimate factual basis" for the same. (R. 474). Nothing in the testimony could lead a court member to believe that these remarks were limited only to referral or preferral.

The determination that there was no prejudice because "Major T's comments apparently had minimal impact on the members, *Cox*, 42 M.J. at 653, is unsupported by the record. According to the lower courts, "minimal impact" was indicated because there was an acquittal on one charge concerning Kayla Ahner. The problem with this reasoning is that most of Major Treanor's testimony concerned the Cox children, not the Ahner child. Kayla Ahner testified at trial; Courtney Cox did not. It is unclear what military appellate courts would have regarded as "impact," but it is clear that petitioner was convicted on all charges regarding the Cox children and that he received 14 years in confinement.

There was prejudice arising from Major Treanor's testimony simply because at the time of the trial, he was Chief

of Military Justice and had personally investigated and prepared the case for trial. The lower courts completely ignored the profound significance of a witness who was the Chief of Military Justice, a Deputy Staff Judge Advocate, and a former prosecutor with intensive involvement in the case. He told the jury that he had personally determined there was a factual basis for the charges and that the charges were legitimate. In addition, the military atmosphere must be taken into consideration. Members of a command rely daily, weekly, or monthly on their Staff Judge Advocates to guide them. Staff Judge Advocates are considered "experts" in their field; command staff routinely rely on them regarding questions of criminal law as well as administrative law. How could court–members coming from such an atmosphere dismiss the conclusion of guilt from the Chief of Criminal Law, especially in the absence of an admonition from the judge on this issue?

Conclusion

There was clearly plain error that worked to the substantial prejudice of petitioner in allowing Major Treanor to testify on the legitimacy of the charges, and by implication the guilt, of petitioner. Further, the tactics used by the government in allowing the same prosecutor to prepare the case, fully aware that he might be a witness, then withdraw at the last hour to become a witness deserves the attention of the court. The precedent set by such conduct could create a "slippery slope" which could be difficult to reverse. The intent of the ethics rules was clearly undercut by such tactics.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

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December 1996

APPENDIX A

UNITED STATES, Appellee

v.

Terry H. COX, Technical Sergeant
U.S. Air Force, Appellant

No. 95–0873
Crim. App. No. 30712

United States Court of Appeals for
the Armed Forces

Argued May 7, 1996
Decided Sep. 27, 1996

Counsel

For Appellant: *Vaughan E. Taylor* (argued); *Colonel Jay L. Cohen* and *Captain Michael McIntyre* (on brief).

For Appellee: *Captain R. Scott Howard* (argued); *Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin* (on brief).

Military Judge: Robert F. Penater

Opinion of the Court

CRAWFORD, Judge:

In March 1993, contrary to his pleas, appellant was convicted by a general court-martial at Ellsworth Air Force Base, South Dakota, with officer members of attempted sodomy of K; rape of K; sodomy of K; taking indecent liberties with K; committing indecent acts on a child (4 specifications with K and 1 with C), in violation of Articles 80, 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 920, 925, and 934, respectively. The convening authority approved the sentence of a dishonorable discharge, 14 years' confinement, and reduction to the lowest enlisted grade. The Air Force Court of Criminal Appeals affirmed the findings and sentence. 42 MJ 647 (1995). We granted review of the following issues:

I

WHETHER PLAIN ERROR OCCURRED WHEN THE INSTALLATION'S CHIEF OF MILITARY JUSTICE TESTIFIED FOR THE GOVERNMENT THAT HE ASCERTAINED THAT THE CHARGES AGAINST APPELLANT HAD A LEGITIMATE BASIS, THUS DESTROYING THE APPEARANCE AND ALL ACTUALITY OF JUSTICE IN THE MILITARY SYSTEM.

II

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL AND CONSTITUTIONAL ERROR BY ADMITTING STATEMENTS WHICH WERE NOT MADE FOR MEDICAL PURPOSES AND WHICH DID NOT CONTAIN ANY INDICIA OF RELIABILITY IN VIOLATION OF THE SIXTH AMENDMENT AS

WELL AS THE MILITARY RULES OF EVIDENCE.

We hold that there was no plain error in admitting Major Treanor's testimony concerning the basis for charging, nor did he err in admitting the victim's statement to other witnesses.

FACTS—Issue I

Appellant and his wife were married nearly 10 years at the time of trial. They had two children: K, born on November 16, 1985; and C, born on December 16, 1988.

The allegations in this case arose on July 25, 1992, when the neighbor's child, A, was found by her mother playing "gross" with K. A's mother found the children hugging in bed. When she questioned the girls, they said they were "playing house" and "French kissing." A's mother questioned K about how she learned about this. K said she would get in trouble for telling. K then said she learned this from movies her mom had thrown away. Shortly thereafter, A's mother called Mrs. Cox. When Mrs. Cox arrived at the neighbor's house, they questioned K further and learned that she had been sexually abused by her father. Mrs. Cox did not report it immediately. But after 5 days when she found out that she might be an accessory for not reporting the abuse, she did report it.

Major Treanor was an assistant trial counsel in this case. Prior to the Article 32, UCMJ, 10 USC § 832, investigation, he went to Mrs. Cox' house. When he arrived, he laid eye–liner pencils on the coffee table. When C saw the eye-liner pencils, she started crying, put her fingers in her mouth, and doubled up in the fetal position. To assist, Mrs. Cox gave C her bunny, "Bea," because it might help. It did. C picked up the eye–liner pencil and placed it between the bunny's legs and said that is what Daddy did.

Prior to trial, the defense requested Major Treanor as a defense witness. Mrs. Cox was questioned on direct examination as to Major Treanor's interview with C but not as to the form and style of questioning. On cross–examination of Mrs. Cox, the defense sought to establish that Major Treanor's interview contaminated C's statement. This contamination was raised in the testimony of a defense witness, Dr. Frank. Dr. Frank was concerned about fabrication, leading questions, and Major Treanor's role, including his giving a gift to the child.

Additionally, the defense cross–examined K concerning how long she spent with Major Treanor discussing her Article 32 testimony. K also admitted talking with the OSI, her therapist, and her mother about her testimony. She admitted that reviewing the allegations helped her practice her upcoming testimony.

The Government concedes that C's statements to her mother and Major Treanor were hearsay. Answer to Final Brief at 16. But they argue an objection was waived; if not waived, C's statement would be admissible as an excited utterance or under the residual hearsay rule. Answer at 17–18.

To rebut allegations of contaminating C by improper questioning, Major Treanor was called in the prosecution's rebuttal.

With regard to C, he testified on direct examination:

> I had to find out in my own mind if there was a legitimate basis for going forward with a charge involving this youngest Cox daughter against her father, I needed to find out if it was there or not.

On redirect examination, Major Treanor testified:

> We as prosecutors, we as attorneys, have an ethical obligation not to bring fraudulent charges, bad faith prosecutions, so on and so forth. In other words we

> have to be certain in our own mind that there is a legitimate factual basis to go forward with allegations against an accused. To do otherwise is not only a breach of faith as professionals, but is something which will undermine the entire judicial system, and that's why we have an obligation to get to the bottom of what the facts are.

There was no objection to the direct or redirect examination set out above.

The defense argues that it is troublesome when the Chief of Military Justice becomes a witness in the case. Final Brief at 6. "[H]ad Major Treanor been the trial counsel, the Rules of Professional Responsibility would not have allowed him to say such things." *Id.* at 8. Appellant continues to argue:

> The conduct of an Air Force Judge Advocate during the course of a trial is subject to strict guidelines by the Air Force Rules of Professional Responsibility, rules of evidence, and case law. The Rules of Professional Responsibility prohibit an attorney in a case from making *extrajudicial public comments* regarding the guilt or innocence of a defendant [Rule 3.6(b)(4)]. An *attorney may not act as an advocate in a case where he is likely to be a witness* [Rule 3.7]. An attorney *may not "assert personal knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, . . . or the guilt or innocence of an accused. . . ." [Rule 3.4(e)]. The alarming tendency of attorneys to either inadvertently become witnesses or to cross–examine witnesses based on personal knowledge was the subject of discussion at the Judicial Conference of the United States Court of Appeals for the Armed Forces, held in May 1995. Professor Lawinkelried discussed this

> phenomenon, noting that disciplinary authorities should enforce this prohibition with "special vigor." Professor Edward J. Imwinkelried, Ethics, The Judicial Conference, United States Court of Appeals for the Armed Forces, 1995, Sec. 12.8.

Final Defense Brief at 8–9 (emphasis added). The defense contends that his testimony "undercuts the clear intent of the ethical requirement placed on advocates." *Id.* at 11.

As to Issue II, the defense argues that trial defense counsel's failure to object to C's statements to her mother, Major Treanor and Mrs. Hunter, was plain error. *Id.* at 17.

DISCUSSION—Issue I

The defense is correct that Air Force Rule 3.6(a) of Professional Conduct 3.6(b)(4), TJAG Policy Letter 26 (Oct. 92), which is identical to the ABA Model Rule of Professional Conduct, prohibits an attorney from making public comments regarding a defendant's guilt or innocence. Rule 3.6 is designed to maintain the dignity of the profession and protect against unwarranted pretrial publicity. *See Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); *Sheppard v. Maxwell,* 384 U.S. 333 (1966). But this is not the case of a lawyer disseminating pretrial information to the public on matters that may impact upon court members.

Additionally, an attorney at trial may not assert a "personal opinion" or set forth a statement that they have personal knowledge of the facts. *See* Air Force Rule 3.4(e), which is identical to the ABA Rule. *See, e.g., State v. Reed,* 684 P.2d 699 (Wash. 1984); *State v. Martin,* 703 P.2d 309, 312–13 (Wash. App. 1985).

Mil.R.Evid. 103, Manual for Courts–Martial, United States (1995 ed.), provides that error may not be based on a ruling admitting evidence absent a timely objection. The

plain–error doctrine applies an appellant fails to object, but demonstrates that there was plain, clear, and obvious error that affected the defendant's substantial rights. *United States v. Curtis,* 44 MJ 106, 140 (1996).

We hold that the defense waived any objection to Major Treanor's testimony. His testimony was not a plain or obvious error that affected the substantial rights of appellant.

FACTS—Issue II

The defense argues that the judge erred by allowing inadmissible hearsay from at least three witnesses: Mrs. Carla Cox, the victim's mother; Ms. Kathy Hunter, a former schoolteacher and guidance counselor; and Major Treanor, the Chief of Military Justice.

At the Cox's home, when Major Treanor was trying to ascertain what the victim would say about the eyeliner pencils, Mrs. Cox provided a stuffed bunny to assist C, the victim, in describing what happened. Mrs. Cox testified that C put the pencil between the bunny's legs and said this is what Daddy did. Major Treanor testified, in rebuttal, about the same incident, repeating the actions of C. There was no objection to any of these statements.

Appellant's wife testified that both K and C had been to the hospital many times and each time they expected to receive treatment to feel better. Mrs. Cox testified that she hired Ms. Hunter based on the suggestion of a friend. Ms. Hunter testified that she was "there to help them" and they could talk about the things that were happening to them to feel better about themselves. She seeks to help children deal with their problems and their fears. She would introduce herself by her first name and then say she was there to help them. However, she did indicate that her small office had toys on the desk. She wore normal business suits and not a

doctor's coat, and spent time playing with the children on the floor. She described her office as a "therapeutic office that has toys there for kids to play with and has a big easel board to draw on." Mrs. Cox explained to her daughters that they were going to see Ms. Hunter because she could help them.

The Court of Criminal Appeals addressed Ms. Hunter's testimony as follows:

> The military judge found that the children were taken by their mother to a "therapist or counselor" who "was going to help them with whatever problems they had." He also found that, based on their "many prior experiences with medical personnel . . . they each did have some expectation of being helped by her, either to discuss their problems or at least to make them feel better about themselves."

42 MJ at 651. The court below concluded:

> We agree that Ms. Hunter's interviews of K and C were medically related. The appellant makes much of the fact that Ms. Hunter was in an office building, and it had "toys . . . and . . . a big easel board to draw on." The fact that her office deliberately displayed none of the attributes of a hospital is no more dispositive of the first prong of the test then the fact Ms. Hunter wore indistinctive, comfortable clothing. Rather, our focus must be on whether the statements were made for "medical" benefit.
>
> * * *
>
> Ms. Hunter was a trained counselor and therapist, the two girls were taken to her for help in overcoming the devastating effects of sexual abuse, and, in our view, that is sufficient "medical" help to

> meet the first prong of the test for Mil.R.Evid. 803(4).

42 MJ at 651. Regarding the second prong, the court below stated:

> The second prong focuses on the expectations of the children, but it "need not be based on the testimony of the child." *Quigley,* 40 MJ at 66. Ms. Hunter testified she told K and C "this is your place" and she "was there to help." Taken alone, these statements do not show that K or C had any expectation of receiving medical benefit from talking with Ms. Hunter. Mrs. Cox testified, however, that she explained to the girls why they were going to see Ms. Hunter. She said she told K and C "we are going to go talk to somebody who could help us with what had happened to us . . . that I didn't have the knowledge to be able to help her, to make her better, and that we needed help, and this counselor specialized in helping children who had to go through things like this, and that she would be better at it and she would be able to help us." The military judge's findings are fully supported by the evidence, and we adopt them. Based on the evidence, we find no abuse of discretion in admitting Ms. Hunter's testimony of hearsay statements. Quigley, 40 MJ at 66.

42 MJ at 651–52.

Ms. Hunter testified that while counseling C, she said that her father "spanked her bottom" and then indicated that she had been spanked by her father on the buttocks and vagina with her pants off. These statements were admitted under the medical treatment exception to the hearsay rule over the objection of the defense counsel.

DISCUSSION—Issue II

As to the statements to Mrs. Cox and Major Treanor, the Government argues that there was waiver and no plain error. In the alternative, they argue that the statements were admissible under Mil.R.Evid. 803(2) or 803(24). Both Mrs. Cox and Major Treanor testified that C was upset when she saw the eyeliner pencils. In Major Treanor's words, it was as if C had seen a vampire. The Government argues if these statements are not an excited utterance they are so close in terms of reliability that they should be admitted under the residual hearsay exception.

As we indicated in *United States v. Grant,* 42 MJ 340, 343 (1995), while not qualifying as an excited utterance, the circumstances surrounding the statement may indicate trustworthiness. The emotional reaction of the child and spontaneity of her statements and actions strongly suggests their trustworthiness. We need not address alternative grounds in this case. We hold that the failure to object to Mrs. Cox's and Major Treanor's testimony was not plain error. *United States v. Curtis,* 44 MJ 106, 140 (1996).

As to Ms. Hunter's statements, there was an Article 39(a), UCMJ, 10 USC § 839(a) session, where admissibility of her testimony was litigated. Mrs. Cox testified that it was her decision to have therapy for the child. There was no government connection with this therapy. Based on this testimony, the judge ruled that Ms. Hunter's testimony "about any statements made to her by the [children] that were reasonably pertinent to her diagnosis of those children's problems and her treatment thereof" were admissible.

We hold that the judge's decision was not an abuse of discretion. The Government established that the children had an expectation of treatment and that the statements were made for the purposes of treatment. *United States v. Siroky,* No. 95–5004, _ MJ _ (Sept. 5, 1996)(and cases cited therein).

Additionally, as mentioned in *Siroky*, Ms. Hunter mentioned that they needed to tell what happened to feel better about themselves. Thus, the statement to Ms. Hunter was admissible as segmented per *Williamson v. United States*, 114 S. Ct. 2431 (1994). Thus, Issue II is without merit.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX, Judge SULLIVAN, and Senior Judge EVERETT concur.

GIERKE, Judge (concurring in part and in the result):

I agree with the majority that admission of Major Treanor's testimony was not plain error. In my view, Major Treanor's testimony should be considered in terms of relevance, not the rules of professional responsibility. Maj Treanor appeared before the court–martial as a witness, not as an advocate. As a witness, he came under the exception to the general prohibition against testimony by attorneys. The exception is cited in the majority opinion and conceded in the defense brief. _ MJ at (7).

The objectionable portion of Maj Treanor's testimony was that there was a "legitimate basis" for the charges. His testimony was offered to rebut a defense claim that Maj Treanor had contaminated the victim's testimony by a suggestive pretrial interview. In my view, Maj Treanor's belief that there was a "legitimate basis" for the charges is irrelevant to an allegation that he contaminated the victim's testimony. *See Hawaii v. Baron*, 905 P.2d 613, 622 (Haw. 1995) (trial court abused its discretion by not precluding the testimony of the screening prosecutor about alleged child abuse victim's credibility).

I am satisfied, however, that admission of Maj Treanor's testimony was not plain error. His vouching for the witness was not emphasized in argument. To the contrary, trial

counsel emphasized the absence of suggestive questioning. When a court member asked if there was any available testimony to help them decide who was telling the truth, the military judge instructed the members as follows:

> Members, the credibility of any witness, including Sergeant Cox [appellant], is up to the members. Military rules don't allow us to bring on witnesses who will give their opinions as to whether any particular person is telling the truth in this case, so that's going to be up to the members.

The focus of the case was on the demeanor and credibility of the witnesses and the circumstances supporting their credibility. No one suggested that the members should convict appellant because Major Treanor thought appellant was guilty. Accordingly, I am satisfied that any suggestion by Major Treanor that he believed the witness was not plain error.

Regarding Issue II, I believe that the majority mischaracterizes the defense argument. _ MJ at (*7*), (*12*). The defense does not argue that defense counsel committed plain error by failure to object; they argue that the military judge committed plain error by admitting the testimony. I agree with the majority that there is no plain error.

APPENDIX B

UNITED STATES

v.

Technical Sergeant Terry H. COX,

FR424–82–2509, United States

Air Force.

ACM 30712.

U.S. Air Force Court of Criminal Appeals.

Sentence Adjudged 23 March 1993.

Decided 9 May 1995.

Accused was convicted by general court–martial, Robert F. Penater, J., of rape, sodomy, and indecent acts or liberties with child. The United States Air Force Court of Criminal Appeals, Heimburg, Senior Judge, held that: (1) military judge did not abuse his discretion in admitting therapist's testimony of hearsay statements under medical exception; (2) admission of mother's hearsay testimony without objection that was part of defense strategy to show contamination of children's testimony was not plain error; (3) erroneous admission of remarks by base chief of military justice that he had ascertained that charges against accused "had a legitimate basis" was not plain error; (4) rape and sodomy charges were not multiplicious with indecent acts or liberties with child charges; and (5) military judge did not abuse his discretion in denying accused's request to question member on whether her crying indicated that she had "made up her mind" about guilt

or whether testimony had triggered memory of sexual abuse that she had not disclosed on initial voir dire.

Affirmed.

1. Military Justice ⚷ 1091

Children's statements to therapist were made for purpose of medical diagnosis and treatment to be admissible under medical exception to hearsay rule, though therapist's office had toys and deliberately displayed none of attributes of hospital, where she was trained counselor, and children were taken to her for help in overcoming effects of sexual abuse. Military Rules of Evid., Rule 803(4).

2. Military Justice ⚷ 1091

Proponent of statements sought to be admitted under medical exception to hearsay rule must show both that statement was made for purpose of medical diagnosis and treatment and that declarant made statement with some expectation of receiving "medical" benefit. Military Rules of Evid., Rule 803(4).

3. Military Justice ⚷ 1091

Testimony of children's mother that she explained that they were going to see therapist because mother did not have knowledge to be able to help them, children needed help, and therapist specialized in helping children who had to go through things like they did was sufficient to show that children had expectation of receiving medical benefit from talking with therapist to support admission of testimony from therapist under medical exception to hearsay rule. Military Rules of Evid., Rule 803(4).

4. Military Justice 1415

Admission of mother's testimony on child's reaction to seeing eyeliner pencils that had allegedly been inserted in her vagina and her actions with her toy bunny in putting pencil between bunny's legs and saying that is what her daddy did, without defense objection, was part of defense strategy, so as not to be plain error; hearsay testimony of mother was part of defense strategy to show contamination of children's testimony that fit into framework of defense expert's testimony about suggestive questioning.

5. Military Justice 1415

Hearsay is inadmissible, but may be considered by court if admitted without objection, unless there is plain error.

6. Military Justice 1414.1

"Plain error" is error that is clear or obvious and adversely affects substantial rights. Military Rules of Evid., Rule 103(d).

See publication Words and Phrases for other judicial constructions and definitions.

7. Military Justice 1414.1

To be plain error, error must not only be obvious and substantial, it must also have had unfair prejudicial impact on jury's deliberations.

8. Military Justice 1415

If there is defense strategy to allow evidence, and admission does not affect substantial right of accused, then there is no plain error.

9. Military Justice ⚷ 1415

Erroneous admission of remarks of base chief of military justice in ascertaining that sexual abuse charges against accused had legitimate basis was not plain error, where remarks were limited by their context to preferral of charges, not ultimate decision on guilt, and his comments apparently had minimal impact on members, since they proceeded to acquit accused of one of specifications of indecent acts on child.

10. Military Justice ⚷ 959

Charge of indecent acts or liberties with child was not multiplicious with rape and sodomy charges.

11. Military Justice ⚷ 890

Military judge did not abuse his discretion in denying accused's request to question member on whether her crying during child's testimony about sexual abuse indicated that she had already "made up her mind" about guilt, and whether testimony had triggered previously repressed memory of sexual abuse that she had not disclosed on initial voir dire, where neither military judge nor counsel had seen member cry, and all members had assured court they would wait until they heard all evidence before deciding case.

12. Military Justice ⚷ 563, 569, 575

Testimony of accused's daughter on her sexual abuse that was corroborated by physical evidence she showed investigators at her home was sufficient to support findings of guilty.

Appellate Counsel for Appellant: Mr. Vaughan E. Taylor, Esq. (argued), Colonel Jay L. Cohen, Lieutenant Colonel

Frank J. Spinner, Captain Joel R. Reifman, and Captain Michael L. McIntyre.

Appellate Counsel for the United States: Captain R. Scott Howard (argued), Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, Major Jules D. Silberberg, and Major John H. Kongable.

Before HEIMBURG, RAICHLE, and BECKER, Appellate Military Judges.

OPINION OF THE COURT

HEIMBURG, Senior Judge.

A general court–martial, sitting with members, convicted Technical Sergeant Cox of rape, two specifications of sodomy, and five specifications of indecent acts or liberties with a child, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, and 934 (1988). His approved sentence is a dishonorable discharge, confinement for 14 years, and reduction to E–1. Among the six errors he has assigned are assertions that the military judge erred by permitting a great deal of unreliable hearsay testimony, not made for purposes of medical diagnosis or treatment. We find no error, and affirm.

I. BACKGROUND

The appellant and his wife married in 1983, and their two daughters ("K" and "C") were born in 1985 and 1988. The rape, sodomies, and all but one of the indecent acts or liberties specifications involved K, while C was the victim of one specification of indecent acts with a child.

The allegations came to light when K and C were playing at a friend's house on 25 July 1992. The friend's mother, Mrs. P, came upon a closed bedroom door and opened it, startling her daughter and K, who were grappling around

on the bed. Questioning the girls separately, Mrs. P found they had been "French kissing," as K had seen people do in some movies her mother "threw away." K, who was then 6 years old, was initially "frightened" at being questioned, Mrs. P said, but then became very upset, saying "her daddy told her he would beat her with the belt—her mother would beat her with the belt if she told her mother, that she would be mad." Mrs. P consoled K, and let the girls go outside to play. Twice thereafter, K returned into the house, crying, to ask Mrs. P not to tell her mommy. When Mrs. Cox called, Mrs. P reported what she saw and heard. Confronted about the incident, K said she learned her "gross" behavior from movies her daddy made her watch. When they watched the movies, she said, her daddy would "try to do what was in the movies to me." K related sodomy, intercourse, and indecent acts her daddy performed. Mrs. Cox testified she at first did not believe K's allegations, but K was adamant they were true, even confronting the appellant that afternoon and asking him why he was lying by denying them. After 5 days, Mrs. Cox reported the allegations, and K was questioned by investigators first on 31 July 1992.

K testified that she and her friend were caught playing "gross," and that she learned such behavior from some movies her dad showed her. In those movies, "the boy was putting his penis inside the girl's vagina" and "was licking the girl's vagina and the girl was licking the boy's penis." She watched the movies lots of times when her mommy was "either shopping or at work or somewhere" and her little sister, C, was "[e]ither taking a nap or playing down in her room." While they watched the movies, her dad would "try to do what was in the movies to me." He put his penis into her vagina, but it only went in "a little." (Showed about ¼ inch with fingers.) When he did, it hurt "[a] lot." When she told him to stop, he would "just go on" and say "just a few more

minutes." Sometimes he tried to put his penis in her "bottom" (pointing and saying "[i]n the back.") "That hurt." He put "jelly stuff" on to make his penis go inside. It was "slick" and "clear" and came in a container that was "like round sort of" and had a top "[y]ou could pop" off. She showed the Air Force Office of Special Investigations (AFOSI) investigator where the container was kept, down in her mom and dad's bathroom. She identified Prosecution Exhibit 1 as the container: it is a jar of petroleum jelly.

K said her dad put "[m]akeup eyeliner pencil caps" in her vagina. They were kept in her mom and dad's bathroom also, "in her makeup basket." K showed how her dad would take the cap off and "put a little bit of jelly on it to make it go in." He put all except the last ¼ to ½ inch of the caps in. He also put his "pinky and his pointer finger" inside her vagina. Her dad also "wanted me to lick his penis." She did—"I was little back then." Her dad would put some "chocolate syrup, maybe a ring lollipop, you know, that has that hoop on it" on his penis to get her to do it. "It made me gag." He also "would lick my vagina" a lot. Out of her dad's penis would come this "white gooey stuff." She would have no clothes on, because her dad always took them off and they were on the floor. He would lie her on a towel on the bed. He said "if anything got on the bed it wouldn't be because the towel would be there." When the "white gooey stuff" came out of her dad's penis, it went "[o]into my stomach." He would then clean it up with a wash cloth, she would put her clothes back on and go and play. Where did these things happen? "It would either be in the bathroom upstairs, the bathroom downstairs which is my mom and dad's bathroom, or in my mom and dad's room, or upstairs on the couch." They watched the movies "[e]ither on the bed or the couch" downstairs. After he was done, he would put medicine on her—she identified a tube of Terazol 7 vaginal cream as what he used—and tell her it was so "if I

went potty it wouldn't hurt." (Other witnesses identified Terazol 7 as a cream used to combat yeast infection in women.) K said she didn't tell anyone because "my dad told me if I told my mom I would get a spanking with the belt." She testified that, as a result of the threat, "I didn't tell until I got caught with [her friend]."

C did not testify at trial, and the primary testimony concerning this specification came from Mrs. Cox. When K's allegations came up, Mrs. Cox and the investigators questioned C, but C denied that her dad touched her in any bad way. Nevertheless, questions about possible sexual abuse lingered, partly because of C's behavior. In October 1992, a pediatrician examined C and said she was "suspicious" of sexual abuse because of her observations of the child's hymen. While she admitted nothing in her observations was necessarily indicative of sexual abuse, she relayed her suspicions to Mrs. Cox, who then took C to the therapist who had been seeing her daughter K.

That therapist was Kathy Hunter, a former school teacher and guidance counselor. Ms. Hunter had a master's degree in counseling and guidance and several years of experience in working with children on various behavioral problems, including "school problems, problems within the family setting, [and] sexual abuse issues." In addition to practical experience, Ms. Hunter had attended seminars, workshops, and had done a considerable amount of reading on the subject of child sexual abuse. She was qualified, without objection, as an expert in "treatment of sexually abused children."

Ms. Hunter testified C would come up to her and say, "We're just not going to talk about the truth." When Ms. Hunter pressed her about what she meant, C would say, "Well, I don't want to talk about it. It makes me sad." On one occasion, C told Ms. Hunter "her daddy had asked her to take off her pants and then he had spanked her bottom." Asked

what she meant by "spanked her bottom," C pointed to her vaginal area and to her buttocks area and "said, 'My daddy spanked me on my bottom, and then he went and washed his hands, and then he told me to get my nightgown on.'" C was 3 years old at that time.

Mrs. Cox testified that, shortly before the Article 32, UCMJ, 10 U.S.C. § 832, hearing in this case, Major T, the base chief of military justice, came to her house to talk with C one more time to determine what, if any, charge her testimony would support. He brought the eyeliner pencils K had previously identified that her dad used. When C saw the pencils, she started crying and withdrew, putting her fingers in her mouth. She refused to look at the pencils. Mrs. Cox calmed C and asked her if her bunny "Bea" could "help her talk about it." C agreed, picked up "Bea," picked out one pencil, and put it between the bunny's legs, saying that's what her daddy did. There was no objection to this testimony at trial.

The appellant denied all charges. He testified he never pulled down either girl's pants to spank her, but did spank C on her bare bottom when she wouldn't want to wear the nightgown that was laid out for her. He said one time, when C was about 2 years old, he was bathing with both girls when K reached out and grabbed him "in the groin area." He "pulled back from her and told her that it wasn't very nice." (Mrs. Cox testified this incident occurred much earlier, when K was 2.) He never allowed K to view his pornographic videotapes, but once she saw them on a shelf in his wardrobe and asked him about them. He testified he got rid of the videotapes "about a year" before trial. He denied ever sexually molesting either of his daughters. He said neither he nor his wife, to his knowledge, explained Terazol 7 to K, and he had no idea how she came up with her testimony about it. He claimed he used the petroleum jelly only to clean his guns and as lip balm.

Dr. Frank appeared as a defense expert in "investigative evaluations and in child sexual abuse evaluation and treatment as well as the field of human memory." He related the theories of memory and testified that "memory" can be implanted by the conditions of the interview. He told of the dangers of "contaminating" children's memories, especially when questioners are authority figures, such as police or OSI agents. He mentioned the close relationship K had with Major T, and how this relationship could have contaminated her memory. Although he said a child's first story is the most "pure," children may not tell everything the first time they talk because they are afraid of the reaction. He said that therapists, himself included, do not like to challenge stories, because it conflicts with their role as therapists. Nevertheless, unless an alleged victim's story is challenged, "it is a problem" because a therapist's continued acceptance of the story can encourage the teller to develop a false memory of abuse. Dr. Frank reviewed records, but did not speak with any of the victims. He conceded he learned that Mrs. Cox initially challenged K about her story for 5 days before Mrs. Cox reported the abuse, and that K revealed almost all of the abuse before the first time she met Major T.

II. THE HEARSAY

Although the appellant asserts the findings are suspect because the evidence is riddled with unsupported hearsay, his attack can be reduced to two significant areas: hearsay admitted over defense objection under the "medical exception" and unobjected–to hearsay about C's statements.

a. The Medical Exception

[1,2] Mil.R.Evid. 803(4) permits the admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The proponent of such statements must show both, that the statement was made for the purpose of medical diagnosis and treatment, and that the declarant made the statement with some expectation of receiving a "medical" benefit. *United States v. Faciane*, 40 M.J. 399, 403 (C.M.A.1994); *United States v. Armstrong*, 36 M.J. 311, 313 (C.M.A.1993); *United States v. Nelson*, 25 M.J. 110, 112 (C.M.A.1987), *cert. denied*, 484 U.S. 1061, 108 S.Ct. 1016, 98 L.Ed.2d 982 (1988). The appellant attacks both prongs of the foundation in his attack on the testimony from Ms. Hunter. He asserts Ms. Hunter did not provide any "medical treatment" as that term is used in Mil.R.Evid. 803(4), and that neither K nor C spoke with Ms. Hunter having any expectation of receiving any medical benefit.

The military judge found that the children were taken by their mother to a "a therapist or a counselor" who "was going to help them with whatever problems they had." He also found that, based on their "many prior experiences with medical personnel . . . they each did have some expectation of being helped by her, either to discuss their problems or at least to make them feel better about themselves." We will defer to the military judge's findings of fact unless clearly erroneous, and review his ruling admitting the hearsay for abuse of discretion. *United States v. Quigley*, 40 M.J. 64, 66 (C.M.A.1994); *United States v. Ureta*, 41 M.J. 571, 575, (A.F.Ct.Crim.App.1994).

We agree that Ms. Hunter's interviews of K and C were medically–related. The appellant makes much of the fact that Ms. Hunter's office was in an office building, and it had "toys . . . and . . . a big easel board to draw on." The fact that her office deliberately displayed none of the attributes of a

hospital is no more dispositive of the first prong of the test than the fact that Ms. Hunter wore indistinctive, comfortable clothing. Rather, our focus must be on whether the statements were made for "medical" benefit. Statements may be given to a social worker or other non–physician health professional for such a purpose and be admissible under Mil.R.Evid. 803(4). *Faciane*, 40 M.J. at 403; *United States v. Williamson,* 26 M.J. 115, 118 (C.M.A.1988). Ms. Hunter was a trained counselor and therapist, the two girls were taken to her for help in overcoming the devastating effects of sexual abuse, and, in our view, that is sufficient "medical" help to meet the first prong of the test for Mil.R.Evid. 803(4).

[3] The second prong focuses on the expectations of the children, but it "need not be based on the testimony of the child." *Quigley*, 40 M.J. at 66. Ms. Hunter testified she told K and C "this is your place" and she "was there to help." Taken alone, these statements do not show that K or C had any expectation of receiving medical benefit from talking with Ms. Hunter. Mrs. Cox testified, however, that she explained to the girls why they were going to see Ms. Hunter. She said she told K and C "we were going to go talk to somebody who could help us with what had happened to us . . . that I didn't have the knowledge to be able to help her, to make her better, and that we needed help, and this counselor specialized in helping children who had had to go through things like this, and that she would be better at it and she would be able to help us."

The military judge's findings are fully supported by the evidence, and we adopt them. Based on the evidence, we find no abuse of discretion in admitting Ms. Hunter's testimony of hearsay statements. *Quigley,* 40 M.J. at 66.

b. "Plain Error" Hearsay

[4] As described above, the crucial hearsay testimony

concerning the abuse of C was supplied, not by Ms. Hunter, but by Mrs. Cox. Ms. Hunter's testimony above C's comments and reactions support the general conclusion that C was sexually abused, but do not unambiguously support guilt as charged. One many conclude the words "spanked her bottom" mean that C was punished by her dad, but it is a more difficult leap of logic to take them to describe sexual abuse. On the other hand, Mrs. Cox's testimony about C's reaction to seeing the eyeliner pencils and C's actions with "Bea" the bunny clearly supported a finding of guilty. Appellant urges us to find that admission of this testimony, without defense objection, was plain error.

[5–7] Hearsay is inadmissible, but may be considered by the court if admitted without objection, unless there is plain error. *United States v. Toro,* 37 M.J. 313, 316 (C.M.A.1993), *cert. denied,* — U.S. —, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994); Mil.R.Evid. 103. Plain error is error that is clear or obvious and adversely affects substantial rights. *United States v. Olano,* — U.S. —, ——, 113 S.Ct. 1770, 1776–77, 123 L.Ed.2d 508 (1993); *United States v. Dudding,* 37 M.J. 429, 430 (C.M.A.1993); Mil.R.Evid. 103(d). In order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberations." *United States v. Fisher,* 21 M.J. 327, 328–29 (C.M.A.1986) (citing *United States v. Young,* 470 U.S. 1, 16–17 n. 14, 105 S.Ct. 1038, 1047 n. 14, 84 L.Ed.2d 1 (1985)).

[8] The question of plain error often turns on defense trial strategy. If there is a defense strategy to allow the evidence, and admission does not affect a substantial right of the appellant, then there is no plain error. *Toro,* 37 M.J. at 317. At the outset of this case the

trial defense counsel made a well–prepared, but unsuccessful, motion in limine to exclude Ms. Hunter's testimony. Later, however, he allowed Mrs. Cox to testify to blatant hearsay when she told how C placed the pencil in the bunny's crotch and said "that's what daddy did." The military judge did not question trial defense counsel on his reasons for allowing Mrs. Cox's hearsay testimony, so we are faced with the task of deciding whether its admission was part of a defense strategy or plain error.

We believe the record supplies ample evidence of a trial strategy which included allowing Mrs. Cox's hearsay testimony. Contrary to appellant's position on appeal, it was K's testimony, not Mrs. Cox's testimony about C's words, which was devastating to the defense. K's testimony, given in person and not through hearsay, was credible on its face and corroborated in significant details by the evidence found in the home. Mrs. Cox's testimony, on the other hand, played a minor role, since it affected only one specification of Charge III. The task for the defense was to undermine the credibility of K's testimony of Dr. Frank. Dr. Frank testified that a questioner can easily and unknowingly influence a child's memory of events, even creating a "memory" of events which did not occur. The events in the home, with Major T present, supplied a good example for the defense to use in showing how interviewers may have so influenced the girls' testimony that they created false memories of sexual abuse by their father. Mrs. Cox testified that Major T showed C the eyeliner pencils. The defense counsel tried, on cross–examination, to show that he went even farther and suggested to C that she pick one of them. Even though Mrs. Cox (and later Major T) denied that such a suggestion was made, this line of testimony fit well into the framework of Dr. Frank's testimony about suggestive questioning, and supplied the defense with ammunition for closing argument.

We conclude that not objecting to the hearsay testimony of Mrs. Cox was clearly part of a defense strategy to show contamination of the Cox girls' testimony, and that its admission did not affect a substantial right of the appellant. We conclude that its admission was, therefore, not plain error.

III. TESTIMONY OF THE CHIEF OF MILITARY JUSTICE

[9] Appellant asserts the military judge committed plain error in permitting the base chief of military justice, Major T, to testify that he had ascertained that the charges against appellant "had a legitimate basis". Major T was a rebuttal witness, called to testify that neither he nor Mrs. Cox suggested to C her allegation that her daddy used eyeliner pencil to commit indecent acts. Trial defense counsel's cross–examination challenged this assertion. He began by questioning Major T's reason for being in the home that evening, conducting an investigation, when C had, until then, denied any sexual abuse by her father. In response, Major T said:

> [B]ecause the previous day there was, for want of a better term, a breakthrough with respect to [a third girl] having identified a particular cosmetic eyeliner pencil. Time was in essence running short. The charges against the accused were scheduled to be preferred on Monday, the . . . 9th of November of 92. Charges had to be drafted and typed up the previous workday, which would have been Friday, the 6th of November. That left us with Thursday . . . as a last possible opportunity to find out if indeed there was a legitimate basis in fact to articulate a charge involving [C] against her father. Certainly I, as an attorney, as the Chief of Military Justice, have an ethical obligation to ascertain if there is a

> legitimate basis or not in fact to go forward with charges in a prosecutorial mode against someone.

Trial defense counsel continued to press the point that Major T was not a trained investigator and, thus, was not aware of proper questioning techniques to avoid contaminating a child's responses. During this interchange, Major T repeated his reasoning for going into the home that evening to question C, and denied suggesting any particular response to her. Major T referred to his "ethical obligation" to be sure that there was a factual basis for charges, both for the protection of the accused and for the integrity of the military justice system. Appellant does not deny that Major T's statements were correct, but asserts that the military judge should have, sua sponte, kept these comments from the members or, at the least instructed the members to disregard them as expressions of personal belief in the appellant's guilt.

Again, we face a question of whether plain error crept into the trial. Unlike the hearsay issue, above, we can discern no tactical basis for trial defense counsel to permit the erroneous injection of opinion about evidence in front of the members. Also, once it came before the members, we fail to see a tactical reason for trial defense counsel not to request the military judge to instruct the members to disregard Major T's comments as an improper expression of personal opinion. That said, we are not convinced the erroneous admission of this testimony amounted to plain error. We are persuaded for two reasons. First, when examined in context, the error isn't as obvious as it now appears. Major T's remarks were limited by their context to the preferral of charges, not the ultimate decision on guilt. It seems self–evident that someone thought there was a basis for trial, or the members wouldn't be there, and that's all Major T testified to. Second, Major T's comments apparently had minimal impact on the members. Not only did none of the trial participants notice the problem,

including the military judge, but the members proceeded to acquit the appellant of one of the specifications of indecent acts on a child. We find the erroneous admission of these remarks was not plain error.

OTHER ISSUES

The appellant has raised four other issues. We will discuss some of them briefly.

[10] Appellant asserts the military judge erred in denying a defense motion to find specification 7, Charge III, multiplicious with Charges I and II, and specifications 2, 5, and 6 of Charge III. We disagree. The military judge found that rape and sodomy were separate offenses from indecent acts or liberties with a child. This ruling was correct. *United States v. Teters,* 37 M.J. 370 (C.M.A.1993), *cert. denied,* — U.S. —, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994). *See United States v. Neblock,* 40 M.J. 747, 749–50 (A.F.C.M.R.1994). He also found that the underlying facts for the various specifications of indecent acts with a child were not identical, thus eliminating any factual basis for multiplicity among them. *See Neblock,* 40 M.J. at 749. This finding was not clearly erroneous. *United States v. Burris,* 21 M.J. 140, 144 (C.M.A.1985), *United States v. Middleton,* 10 M.J. 123, 133 (C.M.A.1981). The military judge correctly ruled specification 7, Charge III, not multiplicious with any other specification.

[11] After the close of the prosecution's case, the court ajourned for one day to permit counsel to interview out–of–town witnesses. On the third day, trial defense counsel asked the military judge to permit individual voir dire of Lieutenant (Lt) C, the junior court member. Defense counsel asserted Lt C "had been noticed to have been visibly upset and crying during a portion of the testimony" from K.

Defense counsel asked to question the member as to whether the crying indicated she had already "made up her mind" about guilt, and whether the testimony had, somehow, "triggered" a previously–repressed memory of sexual abuse she had not disclosed on initial voir dire. Neither the military judge nor counsel had seen the member cry, and there was no evidence she was demonstrative in her emotion, such as by sobbing. The military judge denied the motion, ruling that counsels' assertions were an insufficient basis to bring a member back for such questions.

The military judge's ruling will be tested for abuse of discretion. *United States v. Hamilton,* 41 M.J. 22 (C.M.A.1994), *cert. denied,* — U.S. —, 115 S.Ct. 738, 130 L.Ed.2d 640 (1995). The military judge received a negative response from all the members to the question, "have you, any member of your family, any relative, or anyone close to you been a victim of either rape or sexual misconduct?" All members also assured the court they would wait until they heard all the evidence before deciding the case. A show of emotion by a court member, such as tears in the eyes, is not evidence that the member lied, or that the member cannot or will not maintain an open mind during trial. Much less is a show of emotion, by itself, evidence of some sort of "repressed memory" or sexual abuse. The military judge did not abuse his discretion in denying this request.

[12] In separate assignments of error, the appellant asserts that the evidence is factually insufficient to support findings of guilty, and that the sentence is too severe. We disagree with both assertions. As we previously noted, the testimony of K was clear, consistent, and credible. Moreover, it was corroborated significantly by the physical evidence she showed investigators at her home. Having carefully considered all the evidence, we are convinced of the appellant's guilt. Article 66(c), UCMJ, 10 U.S.C. § 866(c)

(1988). Moreover, we are convinced the appellant received the punishment he deserves, neither more nor less. *United States v. Healy*, 26 M.J. 394, 396–96 (C.M.A.1988).

We conclude the findings and the sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge RAICHLE and Judge BECKER concur.